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Dutch Tax Treaty Policy 2020 for sportspersons and artists

BY DR. DICK MOLENAAR¹

Introduction

The Netherlands wants to change its Tax Treaty Policy for sportspersons and artists.

On 29 May 2020, the Secretary of Finance, Hans Vijlbrief, sent his proposal to the Dutch parliament, in which he discusses in general the Dutch Tax Treaty Policy, including BEPS (Base Erosion and Profit Shifting), the taxation of the digital economy and the relationship with developing countries, but also how The Netherlands wants to deal with the taxation of sportspersons and artists.

Different from the existing Tax Treaty Policy, The Netherlands wants to return to the use of art. 17 of the OECD Model Tax Convention again, both in its bilateral tax treaties and its national tax law. This would bring back The Netherlands in line with the OECD Model Tax Convention but would also create tax problems again for international sportspersons and artists performing in and outside The Netherlands.

Current Dutch Tax Treaty Policy 2011

The current Tax Treaty Policy was published in 2011 and has a remarkable and progressive paragraph about sportspersons and artists. In 2007, The Netherlands had removed unilaterally the taxation of foreign sportspersons and artists working on its territory, when they are resident of a state with which The Netherlands has concluded a bilateral tax treaty. That had made life much easier for both those foreign sportspersons, artists and their teams and companies, because the risk of double taxation was taken away, and for the Dutch organizers of events, because they had less administrative work from these performances.²

Following this step, The Netherlands expressed in the Tax Treaty Policy 2011 that it wanted the same

result for its resident sportspersons and artists with performances abroad: no special rule as art. 17 in tax treaties anymore, but allocation under the normal rules of art. 7 (Business Profits) or art. 15 (Dependent Personal Services). That would lead to less source taxation for Dutch sportspersons, artists, teams and companies and take away double taxation and administrative expenses.

But The Netherlands also understood that new treaty partners perhaps did not want to follow this new and fresh idea, because it was not in line with the OECD Model Tax Convention. Therefore it came with the alternative that if an art. 17 had to be included in a new or renegotiated tax treaty, at least the deduction of expenses had to be allowed, so that source tax would be levied from the real income from the performance. Then source tax was taken from the same taxable income as from which the elimination of double taxation was calculated.³

Furthermore, The Netherlands did not want to use the tax exemption but only the tax credit method to eliminate double taxation for resident sportspersons and artists with foreign income. This would prevent that double non-taxation could occur, when the state of the performance would not make use of its taxing right under art. 17.⁴

Negotiations for Dutch tax treaties after 2011

The first tax treaty after 2011 was immediately successful, because Ethiopia agreed in 2012 not to include art. 17 in the new treaty with The Netherlands. According to a member of the Dutch negotiations team, the Ethiopians had come up with the proposal to leave out art. 17, with the argument that they want to tax the income of their athletes without having to allow a tax credit for foreign withholding tax. This met with the new Dutch intentions, so the tax treaty was undersigned without a special provision for sportspersons and artists.

But the second tax treaty was the renegotiation of a new treaty with Germany in 2012 and that was disappointing,

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² The Dutch source tax rate for non-resident sportspersons and artists was 20% with the possibility to apply for the deduction of expenses at a special office of the Tax Authorities (*Belastingdienst*).

³ For EU member states, this seems to be an unnecessary treaty measure, because deduction of expenses should already be available after the Gerritse (2003), Scorpio (2006) and Centro Equestre (2007) decisions of the European Court of Justice.

⁴ The OECD recommends the use of the tax credit method in par. 12 of the *Commentary on Article 17 OECD Model*.

because it included an art. 16 for sportspersons and artists, corresponding with art. 17 OECD Model. The only exception was made for subsidized sportspersons and artists, mentioned in paragraph 3, but with the condition set at “wholly or mainly”, which means more than 50% financial government support,⁵ it was, in practice, not available for sportspersons and just for some artists, such as classical orchestras or dance companies. The Dutch Secretary of Finance wrote to Parliament that this paragraph 3 would meet with the new Tax Treaty Policy from 2011, but that was incorrect information. A positive element was that the treaty has a full foreign tax credit for Dutch residents, which means that the full amount of German source tax will be credited against Dutch income tax. As other articles in the new tax treaty were far more important than the new art. 16, members of parliament did not push the Secretary of Finance too much about this element of the treaty.

The next new tax treaties, with the UK, Japan, China and others, also contained a special article for sportspersons and artists, very often art. 16, because art. 14 (Independent Personal Services) was combined with art. 7 (Business Profits). In almost every new tax treaty, The Netherlands included the exception of paragraph 3 for “wholly or mainly subsidized” sportspersons and artists, probably because this exception is mentioned in around two thirds of the bilateral tax treaties in the world.⁶ It did make a difference that this exception is almost pointless because hardly anyone qualifies for it anymore.

New positive news came in 2019 with the new tax treaty with Iraq, in which no special article for sportspersons and artists was included. There was hardly any support information, the Dutch Secretary of Finance only mentioned that this was in line with the Dutch Tax Treaty Policy from 2011.

OECD wants to keep art. 17

Already in 2010, The Netherlands had started to promote within the OECD that art. 17 should be removed from the OECD Model Tax Convention, because it was not needed to counteract tax avoidance behaviour of international sportspersons and artists and it leads to double taxation and administrative obstacles. This was made public at the IFA Congress of September 2010 in Rome, where the representative of the Dutch Ministry of Finance advocated why The Netherlands was not applying art. 17 since 2007 anymore to non-resident sportspersons and artists performing on its territory, and that it also wanted to achieve this for its own sportspersons and artists with performances abroad.⁷ This came four months after the OECD had published its 2010

⁵ This exception is an option to restrict the scope of art. 17 and mentioned in par. 14 of the *Commentary on Article 17 OECD Model*.

⁶ See D. Molenaar, “Article 17 for Sportspersons and Artistes: Much More Than an Exception”, in: *40 Intertax 4* (2012), p. 270.

⁷ See R. Vann, D. Molenaar and M. Tenore, “Red Card Article 17”, in: *66 Bulletin for International Taxation 3* (2012), p. 127.

Discussion Draft about Article 17, initially meant to clarify the *Commentary on Article 17 OECD Model*, but with reactions from several sides, this was extended with the question whether art. 17 should be removed from the OECD Model.

After a discussion with its member states, the OECD came to the conclusion in 2014 that it wanted to keep art. 17 in its Model Tax Convention.⁸ The OECD gave three reasons for this decision:

- residence taxation should not be assumed given the difficulties of obtaining the relevant information;
- art. 17 allows taxation of a number of high-income earners who can easily move their residence to low-tax jurisdictions; and
- source taxation of the income covered by the article can be administered relatively easily.

Also, the OECD gave some extra options to restrict the scope of art. 17 OECD Model, which are the following⁹:

- exclusion of employees (par. 2 Commentary), so that art. 15 prevails over art. 17;
- expenses and income tax returns (par.10 Commentary);
- minimum threshold (par. 10.1-10.4 Commentary), such as in the US Model Tax Convention;
- public funds (par.14 Commentary), when performances are wholly or mainly funded from public sources; and
- limited approach of art. 17(2) (par.16 Commentary), as used by Canada, Switzerland and the USA.

New Dutch Tax Treaty Policy 2020

The Dutch Secretary of Finance has concluded after nine years that treaty partners do not want to leave out art. 17 when they negotiate a new tax treaty with The Netherlands. Therefore, he proposes to the Dutch Parliament to change the Dutch Tax Treaty Policy, return to the OECD line and include art. 17 again in future tax treaties. But also he wants to make use of three of the possible restrictions mentioned in the OECD Commentary, *i.e.* the deduction of expenses, the minimum threshold and the exception for performances financed from public funds.

Following from this return to the OECD line, he also wants to undertake a study about ending the unilateral exemption for non-resident sportspersons and artists performing in The Netherlands, which exists since 2007. This study should show whether this Dutch taxation can be reintroduced in such a manner that it would not cause too many problems for organizers and sportspersons and artists.

Comments

This change in the new Dutch Tax Treaty Policy is disappointing for both Dutch and non-resident sportsmen and artists and for the organizers of performances. The Netherlands has put in much effort, at the OECD level,

⁸ OECD, “Issues related to Article 17 of the Model Tax Convention”, 26 June 2014. This was taken over in the 2014 Update of the OECD Model.

⁹ See D. Molenaar, “New options to restrict art. 17 of the OECD Model Tax Convention for sportspersons”, in: *GSLTR 2015/1*, p. 44.

in the years until 2014 to achieve removal of art. 17 from the OECD Model but has given up after the OECD decision to keep the article. This is understandable, because other tax topics are much more important and attack the Dutch position in the international world, such as with BEPS and the taxation of the digital economy. But it is also strange that The Netherlands does not criticize the three OECD reasons to keep art. 17.

Three OECD reasons are wrong

The following can be addressed to these three OECD reasons for art. 17.

1 Residence taxation should not be assumed given the difficulties of obtaining the relevant information.

Nowadays, the relevant information can easily be obtained by the residence state, because past performance dates can be found on the internet, payments are almost only done per bank and states are improving their exchange of information.¹⁰

2 Art. 17 allows taxation of a number of high-income earners who can easily move their residence to low-tax jurisdictions.

Low-tax jurisdictions, such as Monaco, do not have tax treaties, which means that art. 17 in a treaty does not have any effect. To counteract the move to tax havens, states only need to have a unilateral source withholding tax on outgoing income. Why would e.g. The Netherlands need to have an art. 17 in a treaty with Belgium, France, Germany, the UK and others?

3 Source taxation of the income covered by the article can be administered relatively easily.

Why only for entertainers and sportspersons? The same argument is not used for others, such as self-employed, royalties, dividend, employment income and pensions. Moreover, source taxation makes it more complicated, because the income should also be reported in the residence state, where elimination of double taxation should be achieved.

Conclusion

The reasons behind art. 17 are wrong. We do not need art. 17 in the modern world; life would be much easier without such a disturbing tax provision.

Low tax revenue

Furthermore, the taxation of non-resident sportspersons and artists does not bring much tax revenue for a state. Last year the Minister of Finance in Belgium had to answer parliamentary questions about this and he provided the following tax earnings (per year in million euros)¹¹:

year	entertainers	sportspersons	total revenue
2014	14,7	2,4	17,1
2015	14,7	3,5	18,2
2016	16,0	3,4	19,4
2017	17,6	4,4	22,0
2018	16,7	4,2	20,9

The best year was 2017 with € 22 million revenue from this source withholding tax. Belgium had 11,3 million citizens in 2017 and is an open and active state with many performances and sports events, which means that the tax revenue can be extrapolated to other states:

state	citizens (millions)	tax rate	estimated tax revenue (in € million)
Australia	25,5	29%	80,0
Austria	8,9	20%	19,3
Canada	37,6	15%	61,0
Denmark ¹²	5,8	–	11,3
France	67,0	15%	108,7
Germany	83,0	15,825%	142,1
Ireland ¹³	4,9	–	9,5
Netherlands ¹⁴	17,3	–	33,7
Sweden	10,2	15%	16,5
UK	66,7	20%	144,3
USA	325,1	30%	1.054,9

But not yet taken into account with these figures is the possibility to deduct expenses in advance or file tax returns after the year. This is very often done in Australia, Germany, the UK and the USA and would be possible in The Netherlands, so the real figures about the tax revenue will be lower than mentioned in those states.

But altogether, these figures are not impressive and do not support the position that states want to keep art. 17 in the OECD Model (and their bilateral tax treaties) because of the tax revenue.

In addition, the total tax revenue in each state will go down considerably because of the tax credits (or exemptions) for resident entertainers and sportspersons with foreign performances and sports events. This will equalize the tax earnings from non-residents, so that on balance no real tax revenue will remain for a state. This means that not including an art. 17 in a bilateral tax treaty would give the same tax result as now.

¹⁰ Already mentioned in H. Grams, "Artist Taxation: Art. 17 of the OECD Model Treaty – A Relic of Primeval Tax Times?", in: 27 *Intertax* 5 (1999), p. 189.

¹¹ Answers from Minister of Finance Alexander De Croo on Parliamentary Questions from Servais Verherstraeten from 8 August 2019.

¹² This estimate tax revenue is only theoretical, because Denmark does not have a source withholding tax for non-resident entertainers and sportspersons.

¹³ Also Ireland does not have a source withholding tax.

¹⁴ Same as for Denmark and Ireland.

More options from the OECD Commentary are possible

But if the Dutch government really does not believe that it can leave out an art. 17 from new tax treaties, then it should at least combine a minimum threshold at the level of the 2016 US Model of US\$ 30,000 (= 25,000) with the limited approach of art. 17(2), as used by the USA, Canada and Switzerland, in new tax treaties. This would leave out the smaller and medium-sized sportspersons and artists as well as the normal teams, clubs, orchestras, groups and production companies. Then art. 17 would only remain for high-earners, also when they are using their own legal entity.

Also the exception for employees would be good to include in new tax treaties, because the three OECD reasons do not apply to real employment situations. It is anyhow clear that these restrictions are much more effective than the art. 17(3) for subsidized sportspersons and artists which is popular now.

Discussion in the Dutch Parliament

At the moment the proposal for the 2020 Tax Treaty Policy is being discussed in the Dutch Parliament. Several members have raised questions about the changing policy for sportspersons and artists, also because they are afraid that The Netherlands would lose its attractiveness for major international sports events. And they want to know why the remarks of the sports and artists organizations after the 2018 Discussion Draft for the Tax Treaty Policy are not reflected in the current proposal, because these organizations had urged the Secretary of Finance to continue the existing Tax Treaty Policy.

After the proposal for the 2020 Tax Treaty Policy had been published on 29 May 2020, Dutch organizers of sports events and artistic performances have sent alarming letters to the members of parliament. They are already hit very hard by the pandemic and need time to recover in the coming years, so extra expenses following from the reintroduction of the Dutch taxation of non-resident sportspersons and artists would work counterproductive for them.

But the Dutch sportspersons and artists organizations are also realistic that most attention from the members of parliament will go to other, bigger topics in the 2020 Tax Treaty Policy, but they still hope for a change in the proposal for the new Tax Treaty Policy.

Final words

The new approach of The Netherlands is not something to be proud of. The country has been the frontrunner for better taxation of international performing sportspersons and artists, but now wants to give up and return to the OECD line by inserting art. 17 in new tax treaties, even when it knows that the three OECD reasons for art. 17 are wrong. It unfortunately shows that the interest of sportspersons and artists is too small when compared to other topics.

But perhaps The Netherlands will be successful with its policy to include a minimum threshold for sportspersons and artists in new tax treaties. Until now only the USA uses such a threshold in its bilateral agreements. The 2014 Commentary on Article 17 OECD Model recommends an amount of approximately € 18,000, but art. 16(1) of the 2016 US Model raised the amount to US\$ 30,000 (€ 25,000) per person per year. This would work very well combined with a limited approach of art. 17(2). But also the other possible restrictions from the Commentary can be inserted easily in new Dutch tax treaties.

An interesting test is the new tax treaty with Belgium, which will be agreed sooner rather than later. The obstacle was that Belgium did not have a federal government for almost 18 months, but now that has been solved, the expectations are that the new tax treaty is just a matter of time. But will this be without an art. 17 for sportspersons and artists? The three OECD reasons do not apply for the relationship Belgium-Netherlands, because information about performances in the other state is easy to obtain, the states are no tax havens and a source tax is more complicated than sole residence state taxation. And the tax revenue will be around the same with or without an art. 17 for sportspersons and artists.

The Netherlands wants to return to the OECD line, but it also needs to protect its own interests and those of its resident sportspersons, artists and organizers of events. The new 2020 Tax Treaty Policy is a major step backwards, although the Secretary of Finance also has many chances in tax treaty negotiations to show the opposite. Hopefully, the members of the Dutch parliament will encourage him to pay enough attention to this lively topic.